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In the Supreme Court of the United States.

OCTOBER TERM, 1933

No. 133

R. H. STEARNS COMPANY,
Boston, Massachusetts,
Petitioner,

v.

THE UNITED STATES
Respondent.

REPLY BRIEF

FOR PETITIONER

FREDERICK S. WINSTON,
Attorney for Petitioner,
920 Potomac Electric
Power Co. Building,
Washington, D. C.

HOWE P. COCHRAN,
WILLIAM N. WOOD,
JAMES S. Y. IVINS,
MARION P. WORMHOUDT,
RICHARD B. BARKER.
Of Counsel.

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In the Supreme Court of the United States.

OCTOBER TERM, 1933

No. 133

R. H. STEARNS COMPANY, *Petitioner,*

v.

THE UNITED STATES

REPLY BRIEF FOR PETITIONER

POINT I

The Filing of the Claim for Credit Did Not Extend the period of the Statute of Limitations Nor Estop the Taxpayer from Relying on Sections 607 and 609 of the Revenue Act of 1928.

The Bureau of Internal Revenue, during the years 1923 and 1924, labored under two grave errors of law.[1] In the first place it believed that the statute of limitations, while it prevented collection by suit after five years, did not prevent collection

[1] Cf. Gott v. Live Poultry Transit Co., 153 Atl. 801.

by distraint.[2] That error on the part of the Bureau continued until this Court decided *Bowers* v. *New York & Albany Lighterage Co.* (273 U. S. 346) on February 21, 1927, and reversed *Toxaway Mills* v. *United States* (273 U. S. 781) on March 14, 1927. In the case at bar as in the *New York & Albany Lighterage Company* case, the deficiency tax for 1917 was assessed before the expiration of the statutory period of limitations.[3] In each case collection was made after the expiration of the statutory period.[4] The real reason why the Bureau of Internal Revenue allowed the statutory period for collection to lapse was the same in both cases—its erroneous belief that the statute did not limit the time for collection where assessment had been duly made.

The second error under which the Bureau of Internal Revenue labored during the years 1923 and 1924 was that which was reversed by this Court on March 1, 1926 in *Girard Trust Co., et al.* v. *United States* (270 U. S. 163). The Bureau thought that when the Commissioner first scheduled an overassessment to the Collector that constituted an "allowance" of the claim for refund or credit. Accordingly, when the overassessment was sched-

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2 In September, 1922 the Bureau published I. T. 1446 (I-2 C. B. 218) quoted in full on page 15 of our original brief, and in 1925 it was upheld by the Court of Claims which decided that if taxes originally due were collected after the expiration of the five-year statutory period, they could not be recovered back by the taxpayer. *Toxaway Mills v. United States*, 61 Ct. Cl. 363, 372.

3 As extended in this case by the first waiver.

4 Assuming, arguendo, that the second waiver was not valid. See Point III below and pp. 8-15 of petitioner's brief in chief.

uled on March 1, 1924, the Bureau believed that the credit had been allowed and the 1917 deficiency tax in effect collected—a full month before the expiration of the period for assessment as extended by the first waiver. Therefore, even if we assume that the Bureau was not misled by its first error, it is clear that it believed that the collection of the 1917 tax, effected by the scheduling of the overassessment for the later years, was within the statutory period of limitation as extended by the first waiver.

In the light of these facts, it is difficult to take stock in the suggestion contained in the Government's brief that the fatal delay in the final scheduling of refunds and credits on June 28, 1924 was proximately occasioned by the filing of a claim for credit on August 9, 1923, and that if the Collector had not regarded that claim for credit as extending the statutory period, the deficiency tax for 1917 would have been collected before April 1, 1924.

It is probably true that, under the established Bureau practice, where claims for credit were filed, collection of deficiences was postponed pending investigation of the claims for credit. But that does not mean that when a taxpayer filed a claim for credit he consented thereby to the extension of the statutory period for collection of deficiencies, nor was it a representation which would constitute a basis for estoppel.

It may be true, as is urged on page 9 of the Government's brief, that

> "The Collector's notice and demand on August 3, 1923 would plainly have resulted in a

timely collection of the tax, by distraint if necessary, if the petitioner had not promptly filed his claim for credit."

But that does not justify the Government's position that, once a claim for credit was filed, the Commissioner could take twenty years, if he saw fit, in which to act upon said claim, while interest would be accruing at 6 percent on the deficiency during the entire period of his delay, so that, if the claim for credit were eventually disallowed, the taxpayer's debt to the Government on the deficiency might be doubled or trebled by accumulated interest. If the filing of the claim for credit did not extend the Commissioner's time indefinitely, it did not extend it at all. The Commissioner actually needed no extension of time[5] as is demonstrated by the fact that he acted on the claim for credit and certified the overassessment to the Collector on March 1, 1924, and there is nothing in the record to show any reason why the Collector could not have made his adjusting entries and returned his schedule to the Commissioner on March 12 instead of on June 12, and accordingly why the Commissioner could not have signed the schedule of refunds and credits by March 28 instead of on June 28, 1924.

In the light of the Bureau's errors of law and the practices based thereon, we believe that the Government's assertion of estoppel in this case is ill

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[5] The statements in the opinion of the Court of Claims (R. 9-10) and the Government's brief (pp. 10-11) to the contrary nothwithstanding.

founded. The Government bases its estoppel theory upon the decision of the Court of Claims in *Naumkeag Steam Cotton Co.* v. *United States* (2 Fed. Supp. 126). The decision in that case is not yet final, for, although this Court denied the plaintiff's petition for a writ of certiorari on May 15, 1933, it extended the plaintiff's time to file a motion for reconsideration and now has such a motion pending before it. It is respectfully submitted that the Court of Claims erred in its decision in the *Naumkeag Steam Cotton Company* case and that the dissenting opinion of Judge Littleton (2 Fed. Supp. 140) is better reasoned.

In general, the cases in which the courts have applied the doctrine of estoppel in pais fall into two categories: (a) those where the estoppel is based upon misrepresentation, and (b) those where estoppel is based upon waiver or agreement. It is clear that in the instant case there is no basis for estoppel by misrepresentation because misrepresentation must be of a past or existing fact.[6] The representation must have been known, by the one making it, to be false, and the person relying upon it must have believed it to be true and have been reasonable in that belief. The Government does not claim to be able to spell any misrepresentation out of the documents filed by the taxpayer or the taxpayer's conduct.

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6 *Henshaw, et al.* v. *Bissell,* 18 Wall. 255, 271; *Brant* v. *Virginia Coal & Iron Co., et al.,* 93 U. S. 326 at 335; *Insurance Company* v. *Mowry,* 96 U. S. 544; Bigelow on Estoppel, Sixth Edition, pp. 636-637; Everest "The Law of Estoppel," p. 251; Ewart "Estoppel," pp. 68-72.

Where estoppel is based upon waiver or agreement, the courts will not apply it to enlarge upon a method specifically provided by statute. For example, one who states that he will not plead the statute of frauds against an oral contract for the sale of land cannot be held estopped from pleading the statute of frauds, for the very purpose of the statute of frauds would be defeated were the doctrine of estoppel applied. Similarly, where the revenue act provided that a tax case might be finally closed by an agreement signed by the taxpayer and by the Commissioner of Internal Revenue and the Secretary of the Treasury, this Court held that a letter signed only on behalf of the taxpayer did not estop the taxpayer from further pressing a claim, saying:

> "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."[7]

The revenue acts have consistently provided a bar against assessment or collection after the stated periods ***unless both the Commissioner and the taxpayer have consented in writing*** to a later assessment or collection.[8] The indication of one method

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[7] *Botany Worsted Mills* v. *United States*, 278 U. S. 282, 289.; *Smith* v. *Stevens*, 10 Wall 321, 326.

[8] Revenue Act of 1921, Section 250 (d); Revenue Act of 1924, Section 278 (c) and (d); Revenue Act of 1926, Section 278 (c) and (d) (cf. Reveune Act of 1928, Section 506); Revenue Act of 1928, Section 276 (b) and (c); Revenue Act of 1932, Section 276 (b) and (c).

of extending the period of limitations is just as definite and just as exclusive as was the indication of one method of closing cases in the statute considered in the *Botany Worsted Mills* case.

Certainly no promise of indulgence can be spelled out of the claim for credit. In the case of *Andreae* v. *Redfield* (98 U. S. 225) where the shoe was on the other foot, the taxpayer had more reason to expect indulgence from the Treasury than, in the instant case, the Treasury had to expect indulgence from the taxpayer. But this Court in an elaborate opinion held that there could be no estoppel, saying (p. 238):

> "Give the allegations the broadest signification the language employed will justify, and it is clear that the conversations attributed to the Secretary of the Treasury and the officers of the custom-house do not amount to a contract or promise that the statute of limitations should cease to run in any contingency, whether the complainants did or did not cause their claims to be prepared and presented to the Treasury Department for adjustment and allowance."

In that case the court pointed out that immediately after the acts relied on as a basis of estoppel the taxpayer was at liberty to commence suit, having made no contract not to do so. Similarly, in the case at bar, immediately after the filing of the claim for credit, the Collector of Internal Revenue was at liberty to collect the 1917 deficiency tax by distraint or by court proceeding, and was under in-

structions from Washington not to regard the claim as preventing collection.[9]

The Court of Claims did not find that the taxpayer intended the claim for credit to constitute a waiver of the statutory period of limitations. "A waiver is an intentional relinquishment of a known right."[10] Any suggestion that the taxpayer intended the claim for credit as a waiver is refuted by the fact that the taxpayer had already filed one waiver which had been signed by the Commissioner and was still in effect, and had tendered to the Commissioner another waiver which the Commissioner had refused to sign. The presentation of these formal waivers on blanks furnished by the Bureau of Internal Revenue shows clearly that the taxpayer was aware of the formalities necessary to an effective and proper waiver. Accordingly it cannot be doubted that had the taxpayer intended to make further waiver at the time it filed its claim for credit, it would have submitted a formal document similar to the two previously submitted waivers, and would not have left its intention to be implied from the fact of the filing of a claim for credit.

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9 I. T. 1373 (I-1 C. B. 318), which reads:

> "The filing of a claim for credit does not necessarily operate as a suspension of the collection of the tax or make it any less the duty of the Collector to exercise due diligence to prevent the collection of the tax from being jeopardized. He may, if he considers it necessary, collect the tax and leave the taxpayer to his remedy by a claim for refund."

10 Herman "Estoppel and Res Adjudicata," Vol. II, pp. 954-955. § 825; Bigelow on Estoppel, Sixth Edition, p. 720.

Any argument that the claim for credit constituted a request for suspension of the statute of limitations because of the Bureau's practice, must necessarily fail unless it is shown that the taxpayer was aware of a Bureau practice which treated claims for credit as necessarily suspending the statute of limitations. The Bureau of Internal Revenue, in a ruling published in 1929, held that a claim for credit could not be construed as a waiver,[11] and acquiesced in the decision of the District Court for the Northern District of Ohio, Eastern Division, in *National Tool Co.* v. *Routzahn*, 28 Fed. (2d) 914, quoting that portion of the court's opinion which says:

> "I do not think that the taxpayer by claiming credit for taxes due for the years 1916 and 1917 against an overpayment for the year 1918, as an inducement to the Collector not to distrain, constituted a waiver of the statute of limitations nor an estoppel from claiming the benefit of that statute."

and the reasons given by the court for that view.

In the case at bar the Court of Claims did not base its decision upon estoppel. The only case in which a claim for credit has been held to work an estoppel or constitute a waiver is the *Naumkeag Steam Cotton Company* case which, as pointed out above, is still before this Court on the question of whether certiorari should be allowed. In addition to that case the Government relies on *Ralston*

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[11] G. C. M. 5739, VIII-1 C. B. 127.

Purina Co. v. *United States* (75 Ct. Cl. 525, certiorari denied 289 U. S. 732), but in that case the Court of Claims was careful to distinguish "the ordinary case where the taxpayer files the usual claim for credit" [the case at bar] and based its decision upon a telegram which it held to constitute an agreement, continuing: "The telegram in this case was not a claim for credit but was directed primarily to the collection of the additional tax for 1918.". The implication in the *Ralston Purina* case was that an ordinary claim for credit would *not* estop the taxpayers from pleading the statute of limitations.

The Government also cites *Backus* v. *United States* (75 Ct. Cl. 69, certiorari denied 288 U. S. 610), but that case is beside the point for the reason that it involved a compromise agreement in the form of a stipulation of facts and law signed by both parties agreeing to the entry of a consent decree by the Board of Tax Appeals. The *ratio decidendi* was not estoppel in pais but estoppel by judgment—*res adjudicata* and the finality of a consent decree.

The point in *Daube* v. *United States*, 75 Ct. Cl 633, relied on by the Government, was decided on the ground that the peculiar credit there involved (A's overpayment against B's deficiency) was not the kind of credit referred to in section 609 of the Revenue Act of 1928. The case is, of course, entirely inapplicable here.

While arguing that the taxpayer waived the statute of limitations or must be estopped to plead it, the Government in its brief makes the wholly

inconsistent argument[12] that the statute of limitations, contained in Section 250 (d) of the Revenue Act of 1921, had no application to collection by credit. This argument is, of course, exactly contrary to the position taken by the Government and sustained by this Court[13] when taxpayers were claiming that a credit was not a payment.

It is clear that the Bureau of Internal Revenue was not misled by the taxpayer, but it seems more than possible that the taxpayer was misled by the Bureau of Internal Revenue into the belief held by the Bureau prior to the decision in *Bowers* v. *New York & Albany Lighterge Co., supra,* and that for for that reason the taxpayer paid the balance of deficiency taxes for 1917 on September 15, 1924 in response to the Collector's notice and demand of September 1, 1924. In any event the taxpayer had no choice, upon receiving the Collector's notice and demand, but to pay the amount demanded[14]. This payment being *in invitum*, cannot be considered as an acquiescence in any of the actions of the Commissioner, nor as a basis for estoppel[15]. The Government's inference[16] from the fact that this payment was made without protest ignores the provision of the Revenue Act of 1924 (Section 1014 (a)) which eliminated all reason for protest in paying taxes, whether believed to be invalid or not.

12 Brief, p. 10.

13 *Graham* v. *Goodcell*, 282 U. S. 409 at 424; *Parks & Woolson Machine Co., v. United States*, 28 Fed. (2d) 868, Cert. den. 279 U. S. 634.

14 R. S. § 3224, U. S. C. tit. 26 § 154; *Graham* v. *du Pont*, 262 U. S. 234.

15 Cf. *Essex Coal Co.* v. *Commissioner*, 39 Fed. (2d) 892, 894.

16 Brief, p. 9.

In order to avoid the effect of Sections 607 and 609 of the Revenue Act of 1928, the Government is attempting to amend the latter by inserting phraseology which Congress never enacted. According to the Government's contention[17], this section should read as follows:[18]

> "(a) Credit against barred deficiency.—Any credit, *made by the Commissioner on his own motion but excluding any credit heretofore made pursuant to the express request of the taxpayer*, against a liability in respect to any taxable year shall be void if any payment in respect to such liability would be considered an overpayment under Section 607.
>
> "(b) * * *
>
> "(c) Application of section.—The provisions of this section shall apply to any credit made *by the Commissioner on his own motion* before or after the enactment of this act, *except credits made before the enactment of this act pursuant to the express request of the taxpayer.*"[19]

In *Graham* v. *Goodcell* (282 U. S. 409 at 424) the taxpayers were requesting the court to read into Section 611 exactly the same kind of language that the Government is now trying to read into Section 609, and the court refused, saying:

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17 Brief, p. 12.

18 The portions of these quotations in Roman type are the statute as enacted. The Italicized words are the Government's amendments.

19 Cf. dissenting opinion of Judge Littleton in *Naumkeag Steam Cotton Co.* v. *United States*, 2 Fed. Supp., 152.

"* * * * We see no reason for taking such a case out of the statute."[20]

We pray the Court to bear in mind the fact that when Sections 607 and 609 were put into the Revenue Act of 1928, Congress also enacted Section 611 making a single exception in cases where collections had been stayed by claim in abatement. If Congress had intended to except claims for credit also, it would have said so. It certainly had the existence of claims for credit in mind—for it simultaneously enacted Section 609. When the Revenue Act of 1932 was before Congress, the Senate, at the instance of the Treasury Department, inserted an amendment (No. 262) reading:

> "Sec. 1107. *Credit of Overpayments.*—
> (a) If any internal-revenue tax was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim was filed, or a request in writing made, for a credit against the tax so assessed of an amount claimed as an overpayment of internal-revenue tax, and if collection of any part of the tax so assessed was postponed, then (1) a credit (made prior to May 29, 1928) against the tax so assessed shall not be considered as void under the provisions of section 609(a) of the revenue act of 1928, relating to erroneous credits, and (2) the payment (made prior to May 29, 1928) of the part of the tax, the payment of which was so postponed, shall not be considered as an overpayment under the pro-

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20 Cf. *United States* v. *Temple*, 105 U. S. 97, 99; *Faw* v. *Marsteller*, 2 Cranch 10, 23.

visions of section 607 of the revenue act of 1928, relating to payments made after the expiration of the period of limitation on assessment and collection.

(b) As used in subsection (a), the term 'tax' includes any interest, penalty, additional amount, or addition to any internal-revenue tax."[21]

But when the bill went to conference this section was striken out and the Treasury's suggestion thus rejected. The effect of this amendment, if it had been adopted, would be identical with the effect of the language the Government is now trying to persuade this Court to insert in Section 609 of the Revenue Act of 1928 by interpretation. The fact that the Treasury Department recognized the necessity for an amendment to accomplish this purpose and the fact that Congress refused to enact it are significant.

POINT II

This Suit is Not Barred by Laches

The Court of Claims in its opinion and the Government, in its brief, indicate that because the taxpayer waited *almost* six years before bringing suit, it should be barred. Perhaps it would be fair to inquire how far a taxpayer would get with a plea that the Government was barred in some case because it did not assess or collect a tax until the statutory period had *almost* elapsed. Suits for refund of

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21 H. R. 10236, Senate print of May 9, 1932, p. 338.

taxes just as much as suits for collection of taxes, are proceedings in law, not in equity, and the doctrine of laches has no application[22].

POINT III

The Second Waiver Filed by the Taxpayer Was Not Valid

As pointed out in our brief in chief, the signature of the Commissioner on April 7, 1930 was too late to make the second waiver effective. The Government in reply[23] urges that regardless of the Commissioner's signature, this waiver constitutes an estoppel against the taxpayer. In other words, the Commissioner could refuse to accept a waiver as a waiver but at the same time rely on it as the basis of an estoppel having the same effect as a waiver. The Commissioner, at the time it was tendered, refused to accept the disadvantages which would have accrued to him upon signing the second waiver, but now (through the process of calling it an estoppel) wants to claim the advantages just as if he had signed it.

Further, as we have pointed out under Point I above, the statute makes definite provision for the method in which the statute of limitations may be extended, and no other method is permissible. If the waiver is not valid as a formal waiver, it is of no effect for any purpose.

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22 Wood on Limitations, p. 287.
23 Brief, p. 14.

POINT IV

This Suit is Not Barred by the Provisions of Section 3226 of the Revised Statute

The Government's brief urges that the taxpayer may not recover because its suit is upon an account stated and the account shows no balance in favor of the petitioner.

The taxpayer submits that its suit is not barred by the statute of limitations since the facts in the case show not only an account stated for the fiscal year 1918 but a determination of an overpayment of 1918 taxes by the Commissioner of Internal Revenue as evidenced by the certificate of overassessment for said year.

As stated in our brief in chief each taxable year stands alone. *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359. *Burnet* v. *Thompson Oil & Gas Co.*, 283 U. S. 301. The allowance of an overpayment and the delivery of a certificate of overassessment for a particular taxable year is a statement of the account for such year. In the present case the account between the taxpayer and the Commissioner for the year 1918 shows an undisputed overpayment and balance of $14,928.07 for the year 1918 which the Commissioner was obligated to pay the taxpayer by way of a *valid* credit or a refund.

But whether or not the situation raised by the facts in this case could be called an "account stated," the taxpayer is nevertheless clearly entitled to recover because of the determination of

an overpayment by the Commissioner as evidenced by the certificate of overassessment delivered to the taxpayer, coupled with the erroneous crediting of the overpayment determined to be due the taxpayer. *Bonwit Teller & Co.* v. *The United States*, 283 U. S. 258, so held in words which cannot be misinterpreted.

The case is so similar to the case of *Bonwit Teller & Co.* v. *The United States* that it can fairly be said to be identical except for the figures involved. This can be demonstrated by parallel columns:

Bonwit Teller Case	*Stearns Case*
The taxpayer filed a claim for refund of fiscal 1919 taxes within the statutory period.	The taxpayer filed a claim for refund of fiscal 1918 taxes within the statutory period.
Commissioner of Internal Revenue determined that taxpayer had overpaid fiscal 1919 taxes in the sum of $10,866.43, and issued and delivered to petitioner a certificate of overassessment for that amount.	Commissioner of Internal Revenue determined that taxpayer had overpaid fiscal 1918 taxes in the sum of $14,928.07, and issued and delivered to petitioner a certificate of overassessment for that amount.
$9,846.06 of the certificate of overassessment was not refunded to the taxpayer, but was credited against a tax which the Commissioner claimed was then due for the year 1917.	$14,928.07 of the certificate of overassessment was not refunded to the taxpayer but was credited against a tax which the Commissioner claimed was then due for the fiscal year 1917.

The crediting of said amount was shown on the certificate of overassessment.	The crediting of said amount was shown on the certificate of overassessment.
The collection of the 1917 tax was barred by the Statute of Limitations when the credit was made.	The collection of the 1917 tax was barred by the Statute of Limitatations when the credit was made.
Suit was brought in the Court of Claims to recover the sum so misapplied.	Suit was brought in the Court of Claims to recover the sum so misapplied.
This suit was brought within six years from the date of delivery of the certificate of overassessment to petitioner.	This suit was brought within six years from the date of delivery of the certificate of overassessment to petitioner.
The Government contended the suit was barred.	The Government contended the suit was barred.

In the *Bonwit Teller* case this Court held that the action was grounded upon the determination evidenced by the certificate issued by the Commissioner, and that the cause of action arose upon delivery of the certificate to the plaintiff, saying (page 265):

> "The Government further contends that, even if the Commissioner's allowance was authorized, this suit is barred by R. S. Sec. 3226, as amended. 26 U. S. C. Sec. 156. It provides that no suit for the recovery of any internal revenue tax alleged to have been erroneously collected shall be begun after five years from the payment of such tax. The over-

payment made was more than five years before the complaint was filed. This case is not within the clause giving two years after disallowance, because here the claim was allowed. Plaintiff pleads its claim in two forms. The first is based upon the issue and delivery of the Commissioner's certificate showing plaintiff entitled to a refund in the amount specified. The second alleges an account stated showing that there is due plaintiff the amount claimed. *The action* is not for the overpayment of the tax in 1919 but *is grounded upon the determination*[24] *evidenced by the certificate issued by the Commissioner May* 12, 1927. Upon delivery of the certificate to plaintiff, there arose the cause of action on which this suit was brought. United States v. Kaufman, 96 U. S. 567, 570. United States v. Savings Bank, 104 U. S. 728. Bank of Greencastle's Case, 15 Ct. Cls. 25. There is no merit in the contention that the suit is barred." (283 U. S. 258, 265.) (Italics ours.)

It is respectfully submitted that the *Bonwit Teller* case and the present case are identical, and cannot be distinguished.

The Government's brief attempts to dispose of the *Bonwit Teller* case on the theory that this Court had before it only the question whether an action could be brought upon an account stated based upon a certificate of overassessment and no question with respect to the amount of the account was presented to or passed upon by the

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24 i. e., The determination of overpayment, not the determination to credit—cf. first sentence in opinion (283 U. S. at p. 259).

Court. In reply to this contention it should be noted that the question before this Court was whether the taxpayer was entitled to recover the *amount* of an overpayment for the year 1919. This *amount* was definitely reflected in the Court's decision and this Court concluded: "There is no merit in the contention that the suit is barred." The judgment of the Court of Claims was reversed and the taxpayer recovered the amount of the overpayment erroneously credited.

Any contention therefore, at this time that this Court did not pass upon the amount of the account or the amount due the taxpayer under the determination evidenced by the certificate of overassessment, is in effect an implication that the taxpayer in the *Bonwit Teller* case was not entitled to recover but through the failure of this Court to pass on a vital point recovery was erroneously allowed. It is submitted that such contention and implication is without merit and that this Court's decision in the *Bonwit Teller* case which permitted recovery by the taxpayer is sound whether based on the theory of account stated or the Commissioner's determination as evidenced by the certificate of overassessment delivered to the taxpayer.

Furthermore this Court's decision in the *Bonwit Teller* case simply gave effect to the mandatory provisions of the Revenue Acts, and in the present case the Commissioner's duty to refund the amount claimed in this proceeding is mandatory. Section 281(a), Revenue Act of 1924, in effect when the Commissioner determined and approved the overpayment in favor of this taxpayer provides in part:

> "Where there has been an overpayment of any income, war-profits, or excess profits tax imposed by * * * the Revenue Act of 1918, * * * the amount of such overpayment shall be credited against any income, war-profits, or excess profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer."

The Commissioner determined that the taxpayer had overpaid its 1919 taxes in the sum of $14,928.07. The Commissioner was thereupon commanded by the Statute to credit this overpayment against taxes for other years *then due from the taxpayer* and to refund *any balance immediately* to the taxpayer. In the present case the Commissioner did not credit the overpayment against taxes *then due,* since the 1917 taxes were barred. His only alternative was therefore to refund the overpayment to the taxpayer, the overpayment having been scheduled and a claim for refund also having been filed within the statutory period.

This mandatory duty to refund the overpaid taxes does not fall within Section 3226 of the Revised Statutes. As stated by this Court in *Bonwit Teller & Company, supra,* "this case is not within the clause giving two years after disallowance, because here the claim was allowed" and "Upon delivery of the certificate to the plaintiff, there arose the cause of action on which this suit was brought."

Even prior to the decision in the *Bonwit Teller* case this Court held that the six year statute,

namely Section 1069 of the Revised Statutes, Judicial Code, Section 156, was applicable where suit is brought under a statutory provision directing a refund. *Sage* v. *United States,* 250 U. S. 33, 38-39 and *Fidelity & Deposit Co.* v. *United States,* 259 U. S. 296, 303. In each of these cases it was contended by the Government that the two year statute (then R. S. 3227) governed but this Court held that the six year statute of limitations appplied. While the *Sage and Fidelity & Deposit* cases involved the Act of July 27, 1912, C 256, Sect. 1, 37 Stat. 240, it is believed that Section 1069 of the Revised Statutes is equally applicable to the Revenue Acts involved in this proceeding.

Accordingly it is respectfully submitted that the suit in the present case is timely since brought within six years from the time the cause of action accrued, namely, the date the certificate of overassessment was delivered to petitioner.

The case of *Daube* v. *United States,* 289 U. S. 367, upon which the Government relies is materially different from the *Bonwit Teller* case and the present case. In the *Daube* case the Commissioner upon an audit found an overassessment for the year 1919 and mailed a notice to that effect to the plaintiff, "the notice by its terms being provisional and tentative." Later the Commissioner signed a schedule of overassessments and made out a check to the order of the plaintiff which he mailed to the Collector. The Collector, however, discovered that there was a mistake and instead of delivering the check returned it to the Commissioner. Thereupon the Commissioner cancelled the check and or-

dered the Collector to apply the overpayment for the year in question against taxes which were claimed for another year from the partnership of which plaintiff was a member.

But in the *Daube* case *there was no issuance or delivery to the taxpayer of a certificate of overassessment.* This Court distinguished it from the *Bonwit Teller* case as follows:

> *"A different situation was disclosed in the Bonwit Teller case, supra.* There the certificate of overassessment had been delivered to the taxpayer. 'Upon delivery of the certificate to plaintiff, there arose the cause of action on which this suit was brought.' Bonwit Teller & Co. v. United States, *supra,* page 265. Cf. W. J. Friday & Co., Inc. v. United States, 61 F. (2d) 370.
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> "A very different situation is laid before us here. No definitive adjudication in favor of this taxpayer was ever made by the Commissioner or by other competent authority. *The transaction never went beyond the stage of intra-departmental conference and parley."* (Italics ours.)

The present case differs from the *Daube* case and is like the *Bonwit Teller* case in that the certificate of overassessment was in fact issued and delivered to the taxpayer, and suit was brought within six years from the date of such delivery.

The material facts in this case are more nearly analogous to the facts in the case of *Moses et al.,* v. *United States,* 61 Fed. (2d) 791 (C. C. A. 2) cer-

tiorari denied 289 U. S. 743, where although recovery was denied taxpayer because suit was instituted in the District Court which lacked jurisdiction, the Court said (page 793):

> "In the case at bar, the plaintiffs proved facts which created a contractual obligation to pay over the allowed refund, and a breach of that obligation by retention of $52,000 for an unjustifiable reason, i. e., the illegally assessed additional tax for 1915."

The same contractual obligation exists in the present case and suit having been instituted in the Court of Claims which has jurisdiction, the taxpayer should recover.

Respectfully submitted,

FREDERICK S. WINSTON.

Of Counsel:
HOWE P. COCHRAN,
WILLIAM N. WOOD,
JAMES S. Y. IVINS,
MARION P. WORMHOUDT,
RICHARD B. BARKER.